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No. 99-1171

IN THE
Supreme Court of the United States

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., *et al.*,
Petitioners,

v.

RUDOLPH W. GIULIANI, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a New York City law that bans throughout the City all outdoor tobacco product advertising and indoor tobacco product advertising visible from the street is preempted under Section 5(b) of the Federal Cigarette Labeling and Advertising Act as a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes."

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a Washington, D.C.-based nonprofit public interest law and policy center with supporters in all 50 states, including many within the City of New York.[1] WLF devotes a substantial

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF, its supporters, and its counsel, made a monetary
(continued...)

portion of its resources to protecting the right of commercial free speech. To that end, WLF has appeared before this Court and numerous other federal and state courts in cases raising commercial speech issues. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

WLF also believes strongly in the importance of preserving the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act ("FCLAA"). That policy significantly reinforces First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict advertising.

WLF filed briefs in this case when it was before the district court and the Second Circuit. WLF is filing this brief with the consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby adopts by reference the Statement of the Case contained in the Petition.

In brief, Petitioners The Greater New York Metropolitan Food Council, Inc., *et al.* ("Greater New York") challenge New York City's "Youth Protection Against Tobacco Advertising and Promotion Act" (the "Ordinance"), which was signed into law in January 1998. The Ordinance prohibits maintaining any tobacco advertisement within 1,000 feet of "any school building, playground, child day

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[1](...continued)
contribution to the preparation or submission of this brief.

care center, amusement arcade or youth center." Administrative Code § 27-508.3(a) and (b). The prohibition covers all outdoor locations as well as most indoor locations visible from the outside. *Id.* The Ordinance effectively prohibits outdoor cigarette advertising in 97% of Manhattan, 93% of the Bronx, 92% of Brooklyn, and similarly large regions of Queens and Staten Island.

Greater New York thereafter filed suit against the Ordinance, asserting that the Ordinance violates the First Amendment by imposing unwarranted speech restrictions and that Congress intended to preempt such laws when it adopted the FCLAA. On December 15, 1998, the U.S. District Court for the Southern District of New York issued an order granting Greater New York's motion for summary judgment and denying Respondents' cross-motion for summary judgment. Petition Appendix ("Pet. App.") 21a-40a. The court held that the FCLAA expressly preempts the Ordinance. *Id.* at 37a. Because of its preemption ruling, the district court declined to reach the free speech issue. *Id.* at 40a.

On appeal, the Second Circuit reversed. Pet. App. 1a-20a. The court held that, with one minor exception, the Ordinance was not preempted by the FCLAA.[2] The court stated that the Ordinance does not "control cigarette

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[2] The court held that the provision of the Ordinance that exempted from restriction small "tombstone" signs stating "TOBACCO PRODUCTS SOLD HERE" (§ 27-508.3(c)) was preempted by the FCLAA. Pet. App. 12a-15a. The court went on to hold that § 27-508.3(c) was severable from the remainder of the Ordinance and thus that the remaining provisions were fully enforceable. *Id.* at 18a-19a. The effect of this ruling was to render the Ordinance more restrictive of commercial speech than as originally enacted.

advertising information" but instead "restrict[s] only the physical placement of tobacco advertising signs in a manner akin to a run of the mill zoning regulation." *Id.* at 16a. While conceding that the preemption provision of the FCLAA, if read literally, could be interpreted to apply to the Ordinance,[3] the court rejected that interpretation because (the court believed) such a "hyper-literal," "crude," and "overly-expansive, literal interpretation" would "yield results that Congress surely did not intend." *Id.* at 8a, 9a.

In determining congressional intent, the court focused not on the language of the preemption provision, but on language contained in the FCLAA's preamble and in its legislative history. Based on those sources, the court determined: (1) Congress intended to preserve local power to regulate in areas of traditional local concern -- in particular, the power to regulate "sales to minors, taxation, indoor smoking, or 'similar police regulations,'" (*id.* at 18a (quoting S. Rep. No. 566, 91st Cong., 2d Sess. (1969)); and (2) Congress intended to preempt local regulatory power in such areas only to the extent that it interfered with a federal interests in "control[ling] cigarette advertising information" and in "avoiding 'diverse, nonuniform, and confusing'

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[3] While the appeals court by and large refused to focus its attention on the language of the preemption provision, it focused briefly on that language in connection with its analysis of the Ordinance's "tombstone" provision. The court rejected as "sophistry" Respondents' argument that the Ordinance was not "based on smoking and health" within the meaning of 15 U.S.C. § 1334(b). The court held that the Ordinance was "based on smoking and health" both because its legislative history "is replete with references to the twin purposes of promoting health and combating the dangers of smoking," and because the *effect* of another of the Ordinance's purposes (to assist in enforcement of the ban on sales to minors) is to promote health. *Id.* at 15a.

advertising standards." *Id.* at 11a (quoting 15 U.S.C. § 1331). Because the court determined that regulation of sign location "lies within the heartland of the states' historic police powers," and that the Ordinance did not interfere with the federal interest in uniformity, the Ordinance was not preempted. *Id.* at 16a-18a.

The appeals court justified its refusal to focus on the language of the FCLAA's preemption provision by invoking the "presumption against pre-emption" of State and local law by federal law. *Id.* at 7a-9a. The court said that giving full effect to the broadly worded language of the FCLAA's preemption provision would be improper because the effect would be to "subvert the presumption against pre-emption." *Id.*

The appeals court reversed the district court's preemption finding (with the exception described in Note 2 above) and remanded the case to the district court for consideration of Greater New York's constitutional challenges to the Ordinance. *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve the Conflict Among the Circuits Regarding the Scope of Federal Preemption Under the FCLAA

One month after the Second Circuit issued its ruling, the Ninth Circuit held that a Tacoma, Washington ordinance -- identical in all relevant respects to the New York City Ordinance -- was preempted by the FCLAA. *Lindsey v. Tacoma-Pierce County Health Department,* 195 F.3d 1065 (9th Cir. 1999). Pet. App. 75a-93a. The Court should

grant review in this case in order to resolve the irreconcilable conflict between these decisions, on an issue of significant national importance.

There can be no serious argument that *Lindsey* is not in direct conflict with the decision below. Indeed, the Ninth Circuit went out of its way to reject the Second Circuit's holding and to criticize its rationale, as well as decisions of the Fourth and Seventh Circuits that upheld similar ordinances restricting tobacco advertising.[4] *Lindsey* stated that the Second Circuit's rationale "not only [is] unsupportable by reference to the text, but the Congressional purpose of [the FCLAA's preemption provision] supports the preemption of a ban on outdoor tobacco advertising." *Lindsey*, Pet. App. 87a. The Tacoma Ordinance and the New York City Ordinance cannot meaningfully be distinguished from one another; in each instance the local government banned outdoor tobacco advertising in vast sections of the city without imposing similar restrictions on other types of advertising. Yet, the Ninth and Second Circuits reached diametrically opposed conclusions regarding the effect of the FCLAA on those ordinances. Review by this Court is warranted to resolve the conflict created by these decisions.

On January 18, 2000, the parties in *Lindsey* filed briefs on the issue of whether the Ninth Circuit ought to grant

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[4] *Penn Advertising, Inc. v. Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999), *cert. filed*, No. 99-1172 (Jan. 12, 2000).

rehearing *en banc*. The Ninth Circuit has not provided any indication, however, that it is seriously entertaining the thought of granting rehearing, let alone that it is seriously considering reversing the panel decision. In the absence of substantial evidence suggesting that the Ninth Circuit will on its own eliminate the circuit conflict by reversing the panel decision, there is no reason for this Court to delay its resolution of the conflict.

Moreover, the issue takes on added urgency because of the large number of local jurisdictions that have adopted bans on outdoor cigarette advertising in the years following the Fourth Circuit's 1996 *Penn Advertising* decision upholding Baltimore's ban. Such ordinances have spawned large numbers of lawsuits, many of them filed outside the four circuits (the Second, Fourth, Seventh, and Ninth) that have already ruled on the issue. *See, e.g., Missouri Retailers Assoc. v. City of St. Louis*, No. 4:98CV1514 (E.D.Mo. 1999) (striking down St. Louis ban on outdoor tobacco advertising on First Amendment grounds); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (holding that ban on outdoor tobacco advertising is preempted by FCLAA); *Chiglo v. City of Preston*, 909 F. Supp. 675 (D.Minn. 1995) (same); *Lorillard v. Reilly*, No. 99-11118-WGY (D.Mass. Jan. 24, 2000) (upholding Massachusetts ban on outdoor tobacco advertising in face of FCLAA and First Amendment challenges).

There is every reason to believe that litigation raising FCLAA challenges to such advertising bans will continue. Indeed, the First Circuit has granted expedited review of the district court's FCLAA decision in *Lorillard* and has enjoined enforcement of the Massachusetts ban pending appeal.

Moreover, there is no basis for viewing the Ninth Circuit's FCLAA decision as an aberration that is unlikely to be replicated. At least four federal district courts have concluded that outdoor tobacco advertising bans substantially similar or identical to New York City's are preempted by the FCLAA. Two (*Rockwood* and *Chiglo*) are cited above. The other two are the district court decisions in this case and in *Federation of Advertising Industry Representatives, Inc. v. City of Chicago,* 12 F. Supp. 2d 844 (N.D. Ill. 1998), *rev'd and remanded*, 189 F.3d 633 (7th Cir. 1999). Accordingly, as challenges to outdoor tobacco advertising bans continue to make their way through the courts, there is every reason to believe that other federal appeals courts will join the Ninth Circuit in determining that such bans at the state and local level are preempted by the FCLAA.

There is no sound reason for this Court to delay consideration of the FCLAA issue until after additional appeals courts have weighed in on the issue. In view of the existing disarray among the lower federal courts on the issue, State and local governments considering adopting such bans are in desperate need of guidance from the Court. Advertisers and tobacco companies are also in need of guidance regarding their rights to provide truthful information to the public without interference from State and local governments.

II. The Second Circuit's Decision Is Contrary to the Plain Text of the FCLAA and This Court's Decision in *Cipollone*

The Court should grant the petition for the additional reason that the Second Circuit's decision is contrary to the

plain text of the FCLAA and this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

The FCLAA's preemption provision states in relevant part:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).

At least six Justices in *Cipollone* recognized that the language of § 1334(b) is expansive. Even after giving the language of § 1334(b) a "narrow" reading (*Cipollone*, 505 U.S. at 518), the *Cipollone* plurality emphasized that the FCLAA's ban on *any* "requirement or prohibition" "sweeps broadly." *Id.* at 521. *See also id.* at 535 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part).

The Second Circuit did not appear to disagree with that conclusion. Pet. App. 8a (the FCLAA's preemption provision contains "open-ended language" which, if read "literally," would apply very broadly to State regulation of cigarette advertising and promotion). Yet, outside its analysis of the "tombstone" provision, the court made no effort to apply § 1334(b)'s expansive preemption language to the facts of this case.[5] Indeed, the Court rejected *any*

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[5] The court did not, for example, consider whether the Ordinance is "with respect to the advertising or promotion of any cigarettes." 15 (continued...)

reliance on § 1334(b)'s language on the ground that such reliance would be an inappropriate "hyper-literal approach" that "could subvert the presumption against preemption." Pet. App. 8a-9a. Instead, the court based its holding that § 1334(b) did not preempt the Ordinance on its conclusion that the Ordinance did not interfere with what the court viewed as § 1334(b)'s essential purposes -- to "control cigarette advertising information" and to prevent commerce from being impeded by diverse, nonuniform, and confusing cigarette advertising regulations. *Id.* at 16a-17a.

That atextual approach to federal preemption analysis is directly contrary to the approach mandated by *Cipollone* and other preemption decisions of this Court. As the Second Circuit recognized, this Court has held that "[t]he purpose of Congress is the ultimate touchstone of every pre-emption case." *Id.* at 7a (quoting *Medtronic v. Lohr,* 518 U.S. 470, 485 (1996)). The actual statutory language employed by Congress is, of course, the primary basis upon which congressional intent is to be determined. *Hughes Aircraft Co. v. Jacobson,* 119 S. Ct. 755, 760 (1999). Accordingly, the Second Circuit's analysis -- by eschewing any examination of § 1334(b)'s language -- was flawed from the outset.

After closely examining the language of § 1334(b), the Court in *Cipollone* determined that some common-law tort claims against cigarette manufacturers are preempted by the FCLAA but that others are not. The Court determined that failure-to-warn claims are preempted to the extent that they allege a duty to include health warnings in advertising,

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[5](...continued)
U.S.C. § 1334(b).

because such claims amount to requirements "based on smoking and health." *Cipollone*, 505 U.S. at 524 (plurality opinion). Conversely, the Court determined that fraudulent misrepresentation claims are to a large extent *not* preempted because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation -- the duty not to deceive." *Id.* at 528 (plurality opinion). In sum, *Cipollone* made clear that the determination of whether a particular State or local "requirement or prohibition" is preempted by § 1334(b) can only be made after examining whether the requirement/prohibition is covered by the statute's preemption language. By failing to undertake that examination, the Second Circuit has deviated from *Cipollone's* mandate.

Moreover, the Second Circuit decision is insupportable even when considered on its own terms. Citing language in the FCLAA's preamble, the court concluded that Congress intended to preempt local authority in areas traditionally regulated at the local level[6] only to the extent that the local regulation interfered with a federal interest in uniformity of tobacco labeling and advertising regulations. The Second

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[6] The court's conclusion that tobacco advertising has traditionally been subject to regulation at the local level is not supported by the record. Respondents do not contend that they have ever previously attempted to impose special restrictions on tobacco advertising, or to impose restrictions on *any* outdoor advertising based on the subject matter of the advertisement. Indeed, local restrictions on tobacco advertising were not attempted outside Utah until very recently. As this Court held last week, the presumption against federal preemption of State and local law is not triggered when the State or local law addresses a matter that (as here) traditionally has been regulated at the national level rather than the State or local level. *United States v. Locke*, 68 U.S.L.W. 4184, 4189 (U.S. Mar. 6, 2000).

Circuit determined that the Ordinance was not preempted because it did not interfere with the federal interest in uniformity. Pet. App. 16a-17a.[7]

But the Ordinance quite clearly *does* interfere with the federal interest in uniformity of advertising regulations. As a result of the Second Circuit's decision, advertisers will face a maze of additional, nonuniform regulations. In some locations tobacco advertisers need only concern themselves with traditional zoning regulations, while in other locations they will also have to contend with additional, nonuniform restrictions applicable only to tobacco advertising. Simply because tobacco advertisers are already subject to some degree of regulation at the local level is not reason to ignore Congress's mandate and to permit an unlimited degree of nonuniform, local regulation.

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[7] The portion of the FCLAA preamble cited and relied on by the Second Circuit reads as follows:

> It is the policy of the Congress and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby --
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

The court also suggested that § 1334(b) is intended to bar State and local governments from "control[ling] cigarette advertising information" by mandating the specific content of tobacco advertising, but not to bar them from prohibiting tobacco advertising in specified locations. *Id.* at 15a-16a. But that interpretation ignores the plain language of § 1334(b); the statute bars any "requirement *or prohibition*" (emphasis added) imposed for the purposes described in § 1334(b). There is no avoiding the conclusion that a law prohibiting cigarette advertising (but not other types of advertising) at certain locations is a "prohibition" within the meaning of the statute. The Second Circuit's interpretation of the FCLAA, by limiting preemption to those ordinances that create nonuniformity by specifying the content of advertisements, simply writes the word "prohibition" out of the statute.

In sum, review of the decision below is warranted for the additional reason that it is plainly contrary to this Court's decision in *Cipollone* and the text of the FCLAA.

III. The Court Should Grant Review in Order to Provide Guidance Regarding the Extent of the Presumption Against Preemption

In recent preemption cases, the Court invariably has begun its analysis by reciting two precepts that guide its analysis. First, the Court states that preemption ultimately must be based on the intent of Congress; if Congress has expressed its intent to preempt local law, then the issue is resolved in favor of preemption by virtue of operation of the Supremacy Clause. *See, e.g., Medtronic,* 518 U.S. at 486-87; *Cipollone,* 505 U.S. at 516; *English v. General Electric Co.,* 496 U.S. 72, 78-79 (1990).

Second, the Court states that there is a presumption that Congress does not intend its preemption statutes to supersede State law in fields that the States have traditionally occupied, unless Congress has made very clear its intent to do so. *See, e.g., Medtronic,* 518 U.S. at 485.

The Court has not directly confronted the inherent contradiction in those two pronouncements on preemption. If the purpose of Congress is truly the "touchstone" of preemption analysis, then a presumption against preemption can only lead the Court away from the touchstone, substituting instead a bias in favor of preserving state law regardless of congressional intent.

Moreover, the Court has not consistently applied the presumption against preemption. Indeed, in numerous preemption cases over the past two decades, the presumption (whose origin is somewhat obscure) is not mentioned at all. *See, e.g., Freightliner Corp. v. Myrick,* 514 U.S. 280 (1995); *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992); *Norfolk & Western R. Co. v. American Train Dispatchers Ass'n,* 499 U.S. 117 (1991). In *Cipollone,* the Court suggested that the existence of an express preemption statute precluded the possibility of implied federal preemption. *Cipollone,* 505 U.S. at 517. Just three years later, the Court disavowed that suggestion. *Myrick,* 514 U.S. at 288-89.

The inherent tension within the Court's preemption case law has led to considerable confusion among the lower federal courts. That confusion is well illustrated by the decision below. The Second Circuit acknowledged that the plain language of the FCLAA dictated a conclusion that the FCLAA preempted the Ordinance. The court nonetheless

felt itself bound by this Court's presumption against preemption to ignore standard rules of statutory construction in order to uphold the Ordinance. Pet. App. 8a-9a.

The Court should grant review in this case in order to dispel the confusion engendered by the Court's recent preemption case law. The Court should spell out once and for all whether standard rules of statutory construction apply to preemption cases, or whether the presumption against preemption is so strong as to permit courts to disregard federal statutory language in order to avoid interference with the traditional police powers of State and local governments.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: March 13, 2000